Supreme Court, U.S.

No. 92-1390

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT LEE AND ANGELA LEE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Section 2401(b) of the Federal Tort Claims Act (FTCA), 28 U.S.C. 2401(b), which requires a claimant to present his or her claim to the appropriate federal agency within two years after the claim accrues, bars petitioners from amending their daughter's administrative claim, three years after the government's allegedly tortious conduct occurred, in order to add themselves as parties and to assert claims on their own behalf.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Adams v. *United States*, 615 F.2d 284 (5th Cir. 1980)	8
Avery v. *United States*, 680 F.2d 608 (9th Cir. 1982)	8
Avila v. *INS*, 731 F.2d 616 (9th Cir. 1984)	3, 6
Douglas v. *United States*, 658 F.2d 445 (6th Cir. 1981)	8
Leachman v. *Beech Aircraft Corp.*, 694 F.2d 1301 (D.C. Cir. 1982)	7
Manko v. *United States*, 830 F.2d 831 (8th Cir. 1987)	3, 5, 6, 7
McNeil v. *United States*, No. 92-6033 (May 13, 1993)	7
Tucker v. *United States Postal Serv.*, 676 F.2d 954 (3d Cir. 1982)	8
United States v. *Kubrick*, 444 U.S. 111 (1979)	3, 5
Warren v. *United States Dep't of the Interior, Bureau of Land Management*, 724 F.2d 776 (9th Cir. 1984)	8
Williams v. *United States*, 405 F.2d 234 (5th Cir. 1968)	7

Statutes, rule and regulations:

Federal Tort Claims Act:	
28 U.S.C. 1346(b)	2
28 U.S.C. 2401	2
28 U.S.C. 2401(b)	2, 3, 4, 5, 6, 7
28 U.S.C. 2671 *et seq.*	2
28 U.S.C. 2675	8

Statute, rule and regulations—Continued: Page

28 U.S.C. 2675(a) 4, 5
Fed. R. Civ. P. 15(c) 5, 6
28 C.F.R.:
Section 14.2(c) 2, 3
45 C.F.R.:
Section 35.2 4
Section 35.2(b) 2, 4

Miscellaneous:

6A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* (1990) 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 980 F.2d 1337. The opinion of the district court (Pet. App. 5a-10a) is unreported, but is reproduced as an appendix to the opinion of the court of appeals at 980 F.2d 1339.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1992. The petition for a writ of certiorari was filed on February 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Georgia Ann Lee, the minor child of petitioners Robert and Angela Lee, allegedly received negligent medical treatment at the Indian Health Service Hospital in Shiprock, New Mexico, on December 15, 1987. Pet. App. 2a. On July 31, 1989, Angela Lee filed an administrative claim for damages with the Department of Health and Human Services (HHS) on behalf of her daughter. *Ibid.*

By letter dated December 11, 1990, petitioners attempted to amend their daughter's claim by adding themselves as parties and asserting claims for their own emotional distress, medical expenses, and other damages. Pet. App. 2a-3a; Pet. 4-5. On December 20, 1990, HHS denied the amendment as time-barred by 28 U.S.C. 2401(b), which requires presentation of an FTCA claim to the appropriate federal agency within two years after the claim accrues. Pet. App. 2a, 11a; Pet. 5. Petitioners made a second attempt to submit an amended administrative claim on April 13, 1991, but that claim was also denied. *Ibid.*

2. Petitioners then filed this action under the FTCA, 28 U.S.C. 1346(b), 2401, 2671 *et seq.*, arguing that their amendments should be allowed pursuant to 28 C.F.R. 14.2(c). That Justice Department regulation permits amendment of an FTCA claim "by the claimant at any time prior to final agency action or prior to the exercise of the claimant's option under 28 U.S.C. § 2675(a)."[1] Pet. App. 7a.[2]

[1] Petitioners now assert that an HHS regulation, 45 C.F.R. 35.2(b), governs disposition of their claims. Pet. 3-4, 14. The HHS regulation tracks the relevant portion of the Justice Department regulation.

[2] The separate claim of petitioners' daughter is now pending in the district court. See Pet. 5-6 n.2.

The district court dismissed petitioners' suit for lack of subject matter jurisdiction because their administrative claims did not comply with 28 U.S.C. 2401(b). Pet. App. 5a-10a. The district court reasoned that although 28 C.F.R. 14.2(c) permits amendment of an administrative claim prior to final disposition by the agency, "[t]he regulation makes no mention of amending the complaint to add new parties." Pet. App. 7a. The court concluded that to allow petitioners to amend their daughter's administrative claim to add new claimants and new claims three years after the claims accrued would defeat the purpose of the FTCA's limitations period, "which is to encourage the prompt presentation of claims." *Ibid.* (quoting *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979)).

The district court also concluded that petitioners' amendment did not "relate back" to their daughter's original claim, because "[t]he original claim did not notify the government of the nature of the parents' claim, the amount of the parents' claim, or that the parents were claimants in their own rights." Pet. App. 9a. The district court rejected the contrary view of the Ninth Circuit in *Avila* v. *INS*, 731 F.2d 616 (1984), in favor of the Eighth Circuit's "better reasoned opinion" in *Manko* v. *United States*, 830 F.2d 831, 840-842 (1987), that Section 2401(b) does not permit amendment after expiration of the limitations period in order to add new claims by new parties. Pet. App. 8a.

3. The court of appeals affirmed "for substantially the same reasons" as were set forth in the district court's "thorough and well-reasoned" decision. Pet. App. 4a; see *id.* at 1a-4a. The court of appeals noted that the district court relied on the Eighth Circuit's reasoning in *Manko*, which the district court "considered to be more sound" than that of the Ninth Circuit in *Avila*. *Id.* at 3a-4a.

ARGUMENT

1. The Federal Tort Claims Act provides that "[a]n action shall not be instituted upon a claim against the United States for injury or loss of property or personal injury or death * * * unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency." 28 U.S.C. 2675(a). The Act further provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. 2401(b). Petitioners, the "claimants" before the Court, sought to bring claims on their own behalf—seeking damages for injuries that they alone had suffered—more than two years after the allegedly negligent treatment of their daughter. In an effort to circumvent the FTCA's limitations period, petitioners styled their new claims as an amendment to their daughter's claim, and then argued that the amendment "related back" to the timely filing of their daughter's claim. Because petitioners have indisputably failed to comply with the express requirements of the FTCA, however, their claims were properly rejected by the courts below.

Petitioners' claims were not an amendment to their daughter's claim, but rather were entirely new claims, seeking damages for distinct injuries that they allegedly had suffered. Petitioners' contention (Pet. 14) that their position is consistent with 45 C.F.R. 35.2 is meritless. Consistent with the wording of 28 U.S.C. 2675(a), quoted above, that regulation permits "the claimant" to amend his or her own claim at any time prior to final agency action. 45 C.F.R. 35.2(b). As the district court correctly noted, the regulation "makes no mention of amending the complaint to add new parties" (Pet. App. 7a), and it does

not, of course, vary the requirements of Sections 2401(b) and 2675(a).

This Court has observed that "Section 2401(b) * * * is the balance struck by Congress in the context of tort claims against the Government; and we are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims." *United States* v. *Kubrick*, 444 U.S. at 117. Petitioners' attempt to present their claims after the limitations period expired would defeat that purpose and would disrupt the congressionally mandated system for ad-dressing specific claims.

Petitioners also err in arguing (Pet. 13-14) that untimely amendment of their daughter's administrative claim was permissible by way of analogy to Rule 15(c) of the Federal Rules of Civil Procedure. Contrary to petitioners' assertions, the Federal Rules of Civil Procedure do not presumptively apply to administrative proceedings—particularly where, as here, the application of such a rule would effectively undermine an explicit statutory directive. As the Eighth Circuit pointed out in rejecting a similar claim, "Rule 15(c) applies only to relation back of amendments to pleadings in ordinary lawsuits: the current issue does not arise in such a setting." *Manko*, 830 F.2d at 840.

Even if the doctrine of relation back applied to administrative claims under the FTCA, its principles offer petitioners no support here. The doctrine of relation back permits an individual to amend his original pleadings even after the limitations period has expired if "(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or (3) the amendment changes the party or the

naming of the party against whom a claim is asserted." Fed. R. Civ. P. 15(c). In this case, provision (1) is unavailable because relation back is inconsistent with "the statute of limitations applicable to the action"—namely, 28 U.S.C. 2401(b). Provision (3) has no application because peti-tioners have not sought to change the party *against* whom the claim is asserted. That leaves only provision (2). But courts will not grant relation back where the opposing party has not been put on notice regarding the claim raised by an amended pleading. See 6A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1497 (1990). In the present case, "[t]he original claim did not notify the government of the nature of the parents' claim, the amount of the parents' claim, or that the parents were claimants in their own right." Pet. App. 9a. The courts below therefore correctly concluded that petitioners' claim should not relate back to their daughter's original claim. Accord *Manko*, 830 F.2d at 840 (wife's untimely claim did not relate back to husband's claim where his claim did not indicate that wife was a claimant or state the amount of her claim).[3]

2. Petitioners correctly point out that the Tenth Circuit's decision in this case and the Eighth Circuit's decision in *Manko*, 830 F.2d at 841-842, conflict with the Ninth Circuit's decision in *Avila* v. *INS*, 731 F.2d 616, 620 (1984). Nonetheless, this case does not, in our view, merit review, because the issue has arisen only infrequently in FTCA litigation. As the Eighth Circuit concluded in *Manko*, the ruling in *Avila* lacks a sound basis in the law. One of the two decisions on which

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[3] Indeed, petitioners conceded before the court of appeals that "there is nothing in the original claim to put the Department on notice of the existence and involvement of Plaintiff Robert Lee." Pet C.A. Br. 20.

Avila relied, *Leachman* v. *Beech Aircraft Corp.*, 694 F.2d 1301, 1308-1310 (D.C. Cir. 1982), did not involve either a tort claim or 28 U.S.C. 2401(b), while the other, *Williams* v. *United States*, 405 F.2d 234 (5th Cir. 1968), was based on FTCA law prior to the 1966 amendments that required administrative exhaustion in all cases. *Manko*, 830 F.2d at 841. Moreover, in *McNeil* v. *United States*, No. 92-6033 (May 13, 1993), this Court made clear—in the specific context of a claimant's filing of his FCTA claim with the agency—that there must be "strict adherence" to the procedural requirements for institution of an FCTA suit, (slip op. 7), and that the courts "are not free to rewrite the statutory text," slip op. 5.

As the district court observed—and as petitioners do not dispute—in the nine years since *Avila* was decided, no reported case has cited it "for the proposition that new parties and claims may be added before an administrative decision in an amended complaint after the two-year period has run." Pet. App. 8a.[4] In light of the recent decisions that have chosen not to follow *Avila*, as well as this Court's recent decision in *McNeil*, there is a reasonable possibility that the Ninth Circuit would reconsider its position in an appropriate case. If it should decline to do so, and if lower court litigation on the issue should persist, there will be time enough for

[4] Contrary to petitioners' assertion that "the principle of law espoused and applied by *Avila* * * * has been adopted in other circuits, including the Third, Fifth and Sixth Circuits" (Pet. 11 n.3), the Ninth Circuit is the only court of appeals to adopt the position advanced by petitioners. Petitioners' reference to those other circuits at page 11 of their petition apparently is to the cases discussed at pages 16-18 of the petition. As we explain in note 5, *infra*, those cases involve a quite different issue of notice that is not involved in this case.

the Court to consider the question. But at this time, we do not believe review is necessary.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Petitioners err in arguing (Pet. 16-18) that a second intercircuit conflict exists based on *Adams* v. *United States*, 615 F.2d 284 (5th Cir. 1980). *Adams* held only that a federal agency could not, by regulation, expand upon the minimum notice requirements in 28 U.S.C. 2675. *Adams*, 615 F.2d at 288; see also *Tucker* v. *United States Postal Serv.*, 676 F.2d 954, 957-959 (3d Cir. 1982); *Douglas* v. *United States*, 658 F.2d 445, 447-448 (6th Cir. 1981); *Warren* v. *United States Dep't of the Interior, Bureau of Land Management*, 724 F.2d 776, 779-780 (9th Cir. 1984) (en banc); *Avery* v. *United States*, 680 F.2d 608, 610-611 (9th Cir. 1982). That holding is irrelevant to this case because: (1) as the district court noted (Pet. App. 9a), the original claim failed to provide *any* notice of petitioners' own injuries and damages sought, and (2) there is no question of the adequacy of the original administrative filing to present the claim of petitioners' daughter.